SUPREME COURT, U. S.
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No. 539

In the Supreme Court of the United States

OCTOBER TERM, 1969

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., APPELLANTS

v.

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

FRITZ R. KAHN,
Acting General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

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Pursuant to Rule 16(1)(a) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the appeal be dismissed for lack of jurisdiction.

This is a direct appeal by various shipper organizations and state regulatory bodies who were defendant-intervenors in a suit by motor carrier interests seeking to enjoin enforcement of an Interstate Commerce Commission order compelling the cancellation of certain increased rates. The district court dismissed the case as moot, without prejudice; simultaneously dismissed monetary counterclaims of the intervenors

(including the United States as shipper); and discharged security bonds filed by carriers as a condition for the earlier grant of a temporary restraining order.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. 1253. We submit that this Court lacks jurisdiction over the direct appeal and that in the circumstances of this case an appeal from the district court's decision properly lies to the Court of Appeals for the Eighth Circuit under 28 U.S.C. 1291. This appeal should therefore be dismissed.

STATEMENT

In 1963, certain motor carriers, members of appellee Middlewest Motor Freight Bureau, filed schedules with the Interstate Commerce Commission for increased rates, which were permitted to become effective in September 1963. Subsequently, after appropriate administrative proceedings, the Commission, by a report and order dated February 24, 1965 (*I. & S. Docket No. M-17450, LTL Class Rates & Minimum Charges Between Midwest and Central Territories*, 325 I.C.C. 106), found that the rate increases had not been shown to be just and reasonable and ordered them cancelled by September 13, 1965.

On September 9, 1965, the carriers filed this suit to enjoin enforcement of the Commission's order. A temporary restraining order was issued upon the posting by plaintiffs of a bond to compensate any party for damages wrongfully incurred as a result

[1] J.S. App. B, as modified by the court's decision denying motions for amended findings of fact, conclusions of law and order for judgment, or for a new trial, J.S. App. C.

of the temporary restraining order. Appellants supported the Commission and filed counterclaims for restitution of the higher rates paid while the restraining order was in effect.[2] On September 29, 1965, a three-judge court, after hearing, denied the carriers' motion for an interlocutory injunction and dissolved the temporary restraining order (J.S. App. E). The carriers then obtained from the Commission an order postponing until October 11, 1965, the date for complying with the Commission's cancellation order (J.S. App. 6a–7a), in order to afford them a reasonable time within which to publish the appropriate tariffs. Subsequently, the carriers filed higher rates with the Commission which became effective on November 16, 1965. After the Commission found on a new record that the November 16, 1965, rates were just and reasonable, the carriers successfully moved the district court to dismiss this suit as moot, to dismiss the shippers' counterclaims for restitution for the higher rates they paid as a result of the temporary restraining order and to discharge the bonds. The shippers and the United States as shipper filed appeals to this Court and to the Court of Appeals for the Eighth Circuit. The United States has since withdrawn its appeal to this Court.

ARGUMENT

Under 28 U.S.C. 1253 this Court has jurisdiction over any appeal from an order granting or denying an injunction in a civil suit required by statute to be heard and determined by a three-judge district court. Under 28 U.S.C. 2325 an "injunction restraining the

[2] The United States subsequently filed its counterclaim as shipper in 1967.

enforcement, operation or execution, in whole or in part" of a Commission order "shall not be granted unless the application therefor is heard and determined by a district court of three judges * * *." Because the carriers' first rate increase was superseded by the second (November 16, 1965) rate increase, the question presented by the complaint—whether the court should enjoin the Commission's February 24, 1965, order requiring cancellation of the first rate increase—became moot. That order could no longer be "enforced" by the Commission and there was thus no order before the three-judge court as to which it could grant injunctive relief.

The remaining ancillary issues—the shippers' counterclaims for restitution and the appropriate disposition of the carriers' bond—should have been determined by a single district judge. See *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 312 U.S. 621, and 306 U.S. 204. Such a procedure for the determination of what had become essentially an action for restitution by the shippers, with an appeal to the court of appeals, would be in keeping with the policy expressed by this Court "of limiting the three-judge court procedure within its expressly stated confines." *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 443. But the fact that three judges rather than one did consider the question raises no serious problem. In such a situation, the decision is properly treated as if it were the decision of a single judge and thus is reviewable in and only in the court of appeals. *Public Service Commission* v. *Brashear Freight Lines, Inc.*, *supra*, 312 U.S. at 626.

Appellants' characterization of the district court's decision as "a partial grant of the injunction which appellees [the carriers] sought below * * *" (J.S. 13) is untenable. The court's ruling on the shippers' counterclaims, rather than its dismissal of the carriers' complaint, is plainly the issue upon which the appeal is based. And although a single district judge disposing of the shippers' claims for restitution might have been required to rule on the validity of the Commission's finding that the first rate increase had not been shown to be just and reasonable, such a ruling would be merely declaratory in nature and would in no sense amount to an "injunction" for purposes of 28 U.S.C. 2325.

Had the court below ruled in appellants' favor on the restitution issue the carriers, plaintiffs below, having themselves sought and obtained dismissal of the complaint praying for an injunction, could plainly have appealed that ruling only to the court of appeals. Jurisdiction over the appeal from the ruling on the restitution issue should not depend on the result reached by the district court on the merits of that issue. In the absence of an order granting or denying an injunction which would be appealable to this Court under Section 1253, appeal should in both instances be to the court of appeals.

CONCLUSION

The appeal to this Court should be dismissed for lack of jurisdiction.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRITZ KAHN,
Acting General Counsel,
Interstate Commerce Commission.

OCTOBER 1969.